STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2003
v	No. 237172 Wayne Circuit Court
ARTHUR GAMMAGE, Defendant-Appellant.	LC No. 01-001375-01

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b, first-degree home invasion, MCL 750.110a(2), and unarmed robbery, MCL 750.530. He was sentenced to concurrent terms of thirty to seventy years' imprisonment for the two CSC convictions, 140 months to 20 years for the home invasion conviction, and one hundred months to fifteen years for the unarmed robbery conviction. He appeals as of right. We affirm.

Defendant's convictions stem from charges that during the night of August 4-5, 2000, he broke into a house, sexually assaulted a pregnant woman, and stole items from her. Defendant was linked to the offense by DNA evidence.

I. Effective Assistance of Counsel and "Other Acts" Evidence

Defendant argues that he was denied the effective assistance of counsel[1] when his trial attorney failed to object to references by the prosecutor and prosecution witnesses to other sexual assaults,[2] and when counsel failed to move for a mistrial after those references. In particular, in her opening statement the prosecutor referred to the investigation of a "series of rapes" in one police precinct. No objection was asserted. Later, when the prosecutor asked the officer in charge whether the police were investigating "rapes" (in the plural), defense counsel objected to

[1] Const 1963, art 1, § 20; US Const, Ams VI.

[2] Defendant subsequently pleaded guilty to two similar offenses.

the relevance of other incidents. The court and counsel discussed the matter off the record, and the court sustained the objection and instructed the jury to disregard the question. When another police witness testified that "I had information that a subject wanted for a series of –," the prosecutor interrupted the witness and steered her away from that response. Again, no objection was asserted.

Defendant bears a heavy burden of showing a violation of his constitutional right to the effective assistance of counsel. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The right to counsel is not offended unless counsel's performance fell below an objective standard of reasonableness and the defendant was so prejudiced that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Prejudice is present when the court can conclude that there is a reasonable probability that the result of the proceeding would have been different—that is, the jury would have had a reasonable doubt concerning the defendant's guilt. *Pickens*, *supra* at 312; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To properly establish ineffective assistance of counsel, the defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), unless the details of the alleged deficiency are apparent on the already-existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

Defense counsel preserved one allegation of error by objection. Because trial counsel objected to the examination of the officer-in-charge, there is no factual basis for defendant's claim that he was denied the effective assistance of counsel by counsel's failure to object to that question.

Counsel did not object to two other references. Under MRE 404(b)(1),[3] evidence of other crimes, wrongs, or acts may be admissible to show motive, opportunity, intent, preparation, scheme, plan, system, knowledge, identity, or absence of mistake or accident. The record before us does not thoroughly explain the references to the other acts in question. However, the record does reveal that defendant pleaded guilty to other similar offenses under circumstances strikingly similar to those in this case. At sentencing, it was disclosed that the other sexual assaults involved single black women with children at home. The other incidents occurred between 5:00

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[3] MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

a.m. and 6:00 a.m., and it appeared that defendant had staked out the women's homes and targeted them based on their lifestyles. One of the other incidents also involved a visibly pregnant woman. Because of the similarities between the other acts, it is not apparent from the limited record before us that it would have been improper to admit such evidence under MRE 404(b)(1), under an appropriate theory. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993) (evidence of other sexual assaults is permissible if offered for a proper purpose, the evidence is relevant, its probative value is not substantially outweighed by the potential for unfair prejudice, and a cautionary instruction is given if requested); *People v Gibson*, 219 Mich App 530, 533-534; 557 NW2d 141 (1996) (evidence of similar sexual assaults admissible).

Defendant correctly argues that MRE 404(b)(2) requires the prosecution to provide advance notice of its intent to use such evidence:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

No written notice appears in the file. Nonetheless, pre-trial notice can be excused if good cause is shown. MRE 404(b)(2). Moreover, the rule requires advance notice, but does not prescribe the form of that notice. In particular, MRE 404(b)(2) does not expressly require written notice, and we have found no cases interpreting the rule to require *written* notice *filed with the court*. See, e.g., *VanderVliet*, *supra* at 89; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). During a pretrial conference, the prosecutor indicated that she might move to try two cases together because of "similar acts," and she planned to speak with defense counsel about it. Defendant did not request a *Ginther* hearing, so he has not eliminated the possibility that trial counsel was notified of the prosecutor's intention to use evidence of other acts, either orally or in writing off the record.

Because evidence of other acts may have been admissible, there was no "irregularity" in the proceedings Cf. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) ("[a] mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial"). Without a *Ginther* hearing, we must rely on the existing record. On this record, it is not apparent that counsel was ineffective for failing to object or move for a mistrial.

II. Sentence

Defendant next argues that the court did not identify objective and verifiable reasons for departing from the recommended minimum sentence range of the sentencing guidelines. Because these offenses occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2).

The recommended minimum sentence range for the first-degree CSC conviction was 171 to 285 months; the actual minimum sentence imposed was 360 months (30 years). The recommended range for the first-degree home invasion conviction was 84 to 140 months; the actual minimum sentence imposed was 140 months. The recommended range for the unarmed robbery conviction was 50 to 100 months; the actual minimum sentence imposed was 100 months.

The sentences for home invasion and unarmed robbery were within the recommended range of the sentencing guidelines and defendant has not established a scoring error or shown that his sentences were based on inaccurate information. Accordingly, those sentences must be upheld. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

The sentence for first-degree CSC exceeded the recommended range of the sentencing guidelines by seventy-five months. The court was therefore required to state substantial and compelling reasons, based on objective and verifiable factors, for exceeding the guidelines. MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.* at 75-76.

The lengthy sentencing proceeding involved the convictions at issue in this appeal as well as two other criminal episodes (another first-degree CSC, lower court number 01-001386, and another first-degree home invasion for the purpose of committing a sexual assault of a pregnant woman and possession of a firearm during the commission of a felony, MCL 750.227b, lower court number 01-001938). During sentencing, the court stated that it was exceeding the guidelines because of the type of conduct defendant engaged in, the damage to the community inflicted by the serial rapes, the danger posed by defendant, defendant's refusal to acknowledge any responsibility for his actions, and defendant's poor potential for rehabilitation. The court also stated that it was imposing concurrent sentences instead of consecutive sentences in the two other files because of the length of the sentence imposed here.

We find no error. The reasons stated by the court were substantial and compelling, based on objective and verifiable factors. See *People v Armstrong*, 247 Mich App 423; 636 NW2d 785 (2001) (need to protect children and benefits of plea bargain were valid considerations for exceeding guidelines); *People v Deline*, ___ Mich App ___; ___ NW2d ___ (Docket No. 237307, issued December 27, 2002) (defendant's refusal or inability to accept responsibility for his actions and make changes necessary to protect society). The graphic nature of the offense was not adequately contemplated by the guidelines.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff